FILE COPY

No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1931

MATSON NAVIGATION COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 37–40) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 11, 1931. (R. 40.) The petition for a writ of certiorari was filed June 5, 1931 (R. 40), and the writ was granted on October 12, 1931 (R. 41). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 154 of the Judicial Code deprives the Court of Claims of jurisdiction in view of the fact that immediately after the institution of the suit in the Court of Claims proceedings were brought against the United States in a District Court on the same causes of action.

2. Whether the Suits in Admiralty Act deprives the Court of Claims of jurisdiction of a suit brought against the United States by the owner of merchant vessels for reimbursement for increases in wages paid by the owner to crews of the vessels, the claim for reimbursement being based upon a provision in time charters, by the terms of which the vessels, which had been requisitioned, remained in the service of the United States and were operated for the United States by the owner.

STATUTES INVOLVED

These are printed in the Appendix, *infra,* pp. 23–29.

STATEMENT

The Court of Claims sustained a motion to dismiss a petition setting forth the following facts:

On October 15, 1917, the United States Shipping Board, acting under authority of the Act of June 15, 1917, and an Executive Order promulgated by the President on July 11, 1917, requisitioned for use by the United States, seven ships then owned and operated by petitioner. (R. 8.) On December 29, 1917, the Government, acting through the Shipping

Board, entered into seven separate requisition charters with petitioner covering the ships thus requisitioned. (R. 8.) These charters recited that the parties desired to fix the compensation to be paid by the United States for the use of the ships requisitioned and that it was "agreed as follows," *inter alia:*

> In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments. (R. 16.)

There was attached to each charter, and made a part thereof, a so-called "Time Form" which defined the respective rights and duties of the parties in connection with the use and operation of the vessel requisitioned. (R. 17–30.) It provided that the vessel should remain in the service of the United States to be employed as the United States might determine, within certain limits, and that petitioner should operate the vessel for the United States, should furnish crew and necessary equip-

ment, and should pay for provisions, wages, shipping fees, and the requisite supplies. (R. 17, 18.) The United States agreed to provide and pay for fuel, port charges, commissions, brokerage and certain other items (R. 19), and also to pay for the use of the vessels at a monthly rate to be established from time to time by the Shipping Board (R. 20). In addition to the aforesaid compensation the Government by the tenth clause agreed to reimburse the owner "for any proper increase in wages and bonuses over the standard prevailing 1 August, 1917, for masters, officers, and crew." (R. 21.)

This time form contained thirty-eight separate paragraphs covering a great variety of matters, including such as are commonly covered by a time charter of a vessel. (R. 17–30.)

Subsequently petitioner and the United States entered into two contracts whereby the petitioner agreed to manage and operate on behalf of the Government certain other ships which were then in the possession of the Shipping Board. (R. 9, 10.) For services so rendered petitioner was to receive compensation at rates to be fixed from time to time by the Shipping Board. (R. 10.)

Up until October 18, 1926, petitioner from time to time charged to the Government upon its books the sums due as agreed compensation for the use of vessels under the requisition charters, including sums paid by petitioner to the masters, officers, and crews of the requisitioned vessels for alleged proper

increases in wages and bonuses over the rates prevailing August 1, 1917. (R. 10.) Petitioner also charged to the Government sums due for services rendered pursuant to the management and operating agreements referred to in the previous paragraph. (R. 10.) All of these items were carried by petitioner in a single account which petitioner alleges constituted a mutual, current, and running account between petitioner and the Government. (R. 10, 11.) There were included in this account moneys received by petitioner on behalf of the United States under the management and operating agreements. (R. 10.)

On October 18, 1926, petitioner entered into an agreement with the Government with respect to settlement of all claims arising out of the requisition charters and management and operating agreements. (R. 13.) This agreement provided that petioner should accept the sum of $134,722.67 in full satisfaction of all claims which it had against the Government with the exception of a claim for $49,373.11 alleged to have been paid by petitioner because of increases in wages and bonuses. (R. 14, 31, 32, 33.) Petitioner expressly reserved the right to assert a claim for the item last mentioned. (R. 14, 32, 33.)

The sum of $134,722.67 was paid to petitioner concurrently with the execution of the agreement of October 18, 1926. (R. 14.) This suit was brought to recover the sum of $49,373.11, alleged to be due

under the tenth clause of the "Time Form" annexed to the requisition charters.

The Court of Claims specially found that on April 7, 1927, the day after the petition was filed in the Court of Claims, the petitioner filed in the District Court of the United States for the Northern District of California seven separate suits against the United States on the same causes of action sued on in the Court of Claims, and that those cases were pending in the District Court when the Court of Claims rendered its opinion. (R. 36–37.) The Court of Claims sustained the defendant's motion to dismiss the cause, holding that under the circumstances Section 154 of the Judicial Code (pp. 23–24, *infra*) deprived it of jurisdiction. (R. 38–40.) It did not discuss any other point.

SUMMARY OF ARGUMENT

I. The Government presents no argument with respect to the applicability of Section 154 of the Judicial Code to the present action. This question is fully discussed in petitioner's brief and in the opinion of the Court of Claims. We submit the question upon the opinion of that court.

II. Petitioner's claim is founded upon the tenth clause of the "Time Form" attached to the requisition charters. This was a maritime cause of action arising out of the operation of vessels upon which a proceeding might have been brought in admiralty. The vessels in question were operated for the

United States as merchant vessels at the time when the transactions out of which this claim arises took place. Petitioner's cause of action, if any, is therefore within the purview of the Suits in Admiralty Act; and under the decision of this Court in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, the Court of Claims was without jurisdiction.

The Merchant Marine Act of 1920 confers upon the Court of Claims no jurisdiction which it would not otherwise have. That Act merely transferred to the Shipping Board the powers and duties which were imposed upon the President by the Act of June 15, 1917, and preserved to the owners of requisitioned vessels all remedies which they had prior to the repeal of the Act of June 15, 1917. These remedies, when founded upon maritime contracts, were limited by the Suits in Admiralty Act, and the Merchant Marine Act did not purport to remove that limitation.

ARGUMENT

I

DOES SECTION 154 OF THE JUDICIAL CODE DEPRIVE THE COURT OF CLAIMS OF JURISDICTION TO HEAR AND DETERMINE THIS CLAIM?

The Court of Claims specially found (R. 36) that on the day following the commencement of this action in the Court of Claims petitioner filed seven separate suits against the United States in the United States District Court for the Northern District of California on the causes of action here

alleged. The Court of Claims dismissed the petition on the ground that by reason of the pendency of the actions in the District Court the provisions of Section 154 of the Judicial Code deprived it of jurisdiction.

Section 154 (*infra*, pp. 23–24) in terms relates only to suits brought in the Court of Claims while another action is pending against any person acting or purporting to act under the authority of the United States. Petitioner contends that it can not be extended by implication to suits pending not against an agent of the Government but against the Government itself.

The issue involved is fully discussed in petitioner's brief. We submit the question on the opinion of the court below.

II

The Suits in Admiralty Act Deprives the Court of Claims of Jurisdiction Over the Cause of Action Set Forth in the Petition

The Government contends that petitioner's cause of action, if any, is covered by the Suits in Admiralty Act and that the Court of Claims was therefore without jurisdiction to entertain the suit. This contention was not adverted to in the opinion of the lower court, and petitioner now takes the position (Brief, pp. 1, 13) that the record here presents only the issue relating to Section 154 of the Judicial Code, and the brief which it has filed does not discuss any other point.

It is, however, clear that the applicability of the suits in Admiralty Act is now open to consideration. This matter goes to the jurisdiction of the Court of Claims. Even if the matter had not been raised by the defendant below, the Court of Claims should have dismissed the case for lack of jurisdiction on this ground (if there was no other ground for dismissing the case and the Suits in Admiralty Act was applicable). See *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327, *supra; Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 549, 559.

The motion to dismiss alleged merely that the court was "without jurisdiction to hear and determine" the cause, not specifying any precise ground. (R. 35.) The contention based upon the Suits in Admiralty Act was presented to the Court of Claims by the Government in oral argument and also in its supplemental brief in support of the motion to dismiss. The point was discussed in the plaintiff's reply brief. Moreover, the Government in its brief in opposition to the petition for certiorari argued that the action should have been dismissed for want of jurisdiction on this ground.

If the point is well taken the judgment below was correct and must be affirmed. *Langnes* v. *Green,* 282 U. S. 531, 535–539.

The Suits in Admiralty Act (*infra,* pp. 26–27), provides, in part:

> That no vessel owned by the United States * * * or operated by or for the United States * * * shall hereafter, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions. * * *
>
> SEC. 2. That in cases where, if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States, * * * provided such vessel is employed as a merchant vessel. * * *. Such suit shall be brought in the district court of the United States. * * *

In *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 326, 327, this Court said that the Suits in Admiralty Act—

> furnishes the exclusive remedy in admiralty against the United States * * * on maritime causes of action arising out of the possession and operation of merchant vessels,

and that—

> the remedies given by the Act are exclusive in all cases where a libel might be filed under it.

The Act contains no mention of the Court of Claims, and it is clear from the opinion in the *Johnson* case that the Act excludes resort to the Court of Claims in cases which it covers.

Consequently, it is necessary to consider only whether the present suit was on a maritime cause of action arising out of the possession or operation of merchant vessels for which a proceeding in admiralty could have been maintained against the United States. We submit that the suit falls within this classification.

A. PETITIONER'S CLAIM IS ON A MARITIME CAUSE OF ACTION ARISING OUT OF THE OPERATION OF VESSELS UPON WHICH A PROCEEDING IN ADMIRALTY COULD HAVE BEEN MAINTAINED

It is well settled that a charter party is a maritime contract and that a suit on one of its provisions relating to a maritime matter is a suit upon a maritime cause of action over which admiralty has jurisdiction. *Morewood* v. *Enequist,* 23 How. 491; *Dunbar* v. *Weston,* 93 Fed. 472 (N. D. N. Y.); *The Nellie T.,* 235 Fed. 117 (C. C. A. 2d); *The Arlyn Nelson,* 243 Fed. 415 (W. D. Wash.).

In the court below the petitioner argued that its claim was not based upon a maritime contract, as the so-called requisition charter related primarily to the fixing of just compensation, and that by it no ship was let, as it had already been requisitioned. The petitioner argued further that even if the charters were in part maritime, admiralty would have no jurisdiction because of the principle that admiralty is without jurisdiction over contracts which are in part maritime and in part nonmaritime. We submit that these contentions are unsound or inapplicable to the facts of this case.

What the petitioner is suing for here is not the just compensation to which it was entitled by virtue of the taking of the vessels and for which the Urgent Deficiencies Act of June 15, 1917 (pp. 24–25, *infra*), provided it might sue in the Court of Claims. Whatever circumstances impelled the petitioner to enter into the requisition charters could not alter the fact that the charters were agreements essentially maritime in their nature and that suits on causes of action arising from such agreements may be maintained in admiralty. The charters recited that the petitioner accepted them in full satisfaction of claims against the United States arising out of the requisition. They contained provisions such as are customarily found in time charters,[1] and also provided that the petitioner should operate the vessels for the United States, should furnish crews and the necessary equipment, and should pay for provisions, wages, shipping fees, and the requisite supplies. The charters related to the operation of ships upon navigable waters, and the item in dispute related to a matter which is essentially a maritime matter arising out of the operation of vessels, namely, the payment of a part of charter hire.[2]

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[1] Cf. Forms 409 and 410 in 3 Benedict on Admiralty (5th Ed.) 82–96.

[2] Even if the requisition charters could be considered as primarily relating to a nonmaritime matter, it would seem that an action for a part of the stipulated charter hire would be cognizable in admiralty because this matter may be adjudicated separately. See *Compagnie Francaise* v. *Bonnasse*, 19 F. (2d) 777 (C. C. A. 2d), certiorari denied, 275 U. S. 551; *United Fruit Co.* v. *Fleet Corporation*, 42 F. (2d) 222, 224, *supra*.

While it is true that the sums payable to petitioner under the charters were accepted as the just compensation provided by law, the Act of June 15, 1917, made no provison for the recovery of an increase in wages or bonuses, and it is clear that any right that petitioner had to recover these items was entirely dependent upon the agreements. *New York & Porto Rico Steamship Co.* v. *United States,* 29 F. (2d) 1014 (C. C. A. 2d). See also *Luckenbach Steamship Co., Inc.,* v. *United States,* 299 Fed. 876 (S. D. N. Y.); *Luckenbach Steamship Co., Inc.,* v. *United States,* 42 F. (2d) 156 (C. C. A. 2d); *Pacific Mail Steamship Co.* v. *United States,* 59 C. Cls. 246.

In the *New York & Porto Rico Steamship Co. case, supra,* it was held that recovery under a requisition charter similar to that here involved did not include interest for the reason that the action was one founded upon an express contract rather than one for just compensation. See also *Olympia Shipping Corporation* v. *United States,* 71 C. Cls. 251, now pending in this Court upon the Government's petition for certiorari (October Term 1931, No. 85); *Atlantic Refining Co.* v. *United States,* 69 C. Cls. 713, certiorari denied, 282 U. S. 859.

The claimant relinquished its right to a judicial determination of just compensation and accepted in lieu thereof the Government's contractual obligation. Cf. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75.

In the court below petitioner contended that this could not be considered to be a suit upon a maritime cause of action because the petition alleged that it was brought to recover the unpaid balance of an open, current, mutual, and running account. This would seem to be entirely inconsistent with the argument that the suit is one for just compensation under the Act of June 15, 1917, and the Merchant Marine Act of 1920. In any event we are unable to agree with this view of the case.

The claim for increased wages and bonuses was expressly excluded from the settlement between petitioner and the Shipping Board. It never lost its identity by being merged in a general balance, but on the contrary was regarded as a distinct and separate item as to which petitioner's rights were expressly reserved.

Even if this be regarded as a suit upon a mutual account, the maritime nature of the action is not thereby destroyed. *Morse Dry Dock & Repairing Co.* v. *Munson Line,* 155 Fed. 150 (S. D. N. Y.), affirmed, 158 Fed. 1021 (C. C. A. 2d); *The Hattie Thomas,* 262 Fed. 943 (C. C. A. 2d); *The Castlewood,* 298 Fed. 184 (E. D. Pa.), affirmed, 5 F. (2d) 1013 (C. C. A. 3d). These were suits upon accounts stated and were held to be within the admiralty jurisdiction. The principle which they illustrate is equally applicable here.

Although we have been able to find no case discussing the nature of the provision involved here,

an action on similar provisions has been held to relate to maritime causes of action as to which the Suits in Admiralty Act furnishes the exclusive remedy. *United Fruit Co.* v. *Fleet Corporation* 42 F. (2d) 222 (D. Mass.).

In *N.S. Byonnes & Son Dampskibsrederi Aktieselskab* v. *United States,* 298 Fed. 123, 124 (S. D. N. Y.) it was said by way of *dictum* that the Suits in Admiralty Act was not intended to apply to owners of vessels "who had a contract on which they might sue in the Court of Claims or under the Tucker Act." Since this Court has held that the mere fact that a plaintiff has a contractual right against the Government does not permit him to sue under the Tucker Act if the cause of action is within the purview of the Suits in Admiralty Act, no weight can now be attached to this *dictum. Federal Sugar Refining Co.* v. *United States,* 280 U. S. 320.

In *Luckenbach Steamship Co.* v. *United States,* 299 Fed. 876, *supra,* a suit was brought in admiralty to recover under a requisition charter claims which the owner asserted against the United States "arising out of recoveries against the owner by third parties on the vessel's commitments." The petition was dismissed for failure properly to allege settlement by the Shipping Board, but leave to file an amended petition was granted, and there was no intimation of lack of admiralty jurisdiction.

In *Luckenbach Steamship Co.* v. *United States,* 42 F. (2d) 156, *supra,* the owner sued under the

Tucker Act to recover counsel fees and expenses incurred in defending a libel *in rem* filed while the ship was under requisition charter to the Government. Although the case was dismissed upon the merits, no question was raised as to the propriety of bringing such a suit under the Tucker Act.

In *New York & Porto Rico Steamship Co.* v. *United States,* 29 F. (2d) 1014, *supra,* the cause of action was exactly the same as in the instant case, suit being brought to recover increases in wages and bonuses under the provisions of a requisition charter. The suit was under the Tucker Act and the applicability of the Suits in Admiralty Act was not considered.

In a number of cases the Court of Claims has rendered judgment for plaintiffs in actions brought on requisition charters. Apparently the applicability of the Suits in Admiralty Act was not raised in any of these cases except the *Olympia Shipping Corporation* case, *supra.* There, after judgment was rendered, this question of jurisdiction was raised on a motion for a new trial, which the court overruled without opinion.

It has been argued that the Suits in Admiralty Act was intended to apply only to suits against the United States by third parties sustaining damages arising out of the operation of ships by or for the Government. This argument is apparently based

on the theory that the Act was designed solely to relieve the Government of the embarrassment of having its ships subjected to proceedings *in rem*. While this was undoubtedly the primary purpose of the Act, it has a distinctly broader application. In *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, this Court held that the Act permitted suit *in personam* against the the Government in a case in which no action *in rem* could possibly have been brought. There is nothing in the Act which purports to confine its operation to suits by third parties or to exclude suits by the owners of vessels chartered to the Government. The opinions of this Court in *Fleet Corporation* v. *Rosenberg Brothers*, 276 U. S. 202, and *Johnson* v. *Fleet Corporation*, 280 U. S. 320, *supra*, indicate that the Suits in Admiralty Act applies to all maritime causes of action which arise out of the possession or operation of merchant vessels by or for the United States.

B. PETITIONER'S SHIPS WERE MERCHANT VESSELS OPERATED BY OR FOR THE UNITED STATES

The Suits in Admiralty Act authorizes libels *in personam* against the United States only in cases where the ships involved are employed as merchant vessels (or tugs, which are not here involved). This has been construed to mean that the vessel must have been owned or operated by or for the United States as a merchant vessel, as distinguished

from a public ship, when the transaction occurred out of which the alleged liability arose. *Shewan & Sons* v. *United States*, 266 U. S. 108; *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

The petition in the Court of Claims states that the petitioner was, at all times pertinent to the suit, engaged in the business of transporting passengers and goods between the Pacific Coast and the Hawaiian Islands and the vessels here involved were at all times operated in this traffic. (R. 7.) The third article of the time charters (R. 18) provides that the vessel while being operated by the owner under the charter, shall not have the status of a public ship but shall be subject to all laws and regulations governing merchant vessels. The same clause further provides that when the vessel is engaged in the service of the War or Navy Department it shall have the status of a public ship, and makes certain provisions for its operation under such circumstances; but it does not appear that this contingency ever occurred.

Petitioner has at no time contended that its vessels were ever employed by the United States in any capacity other than as merchant vessels, and we submit that the petition and exhibits annexed thereto sufficiently show that Section 2 of the Suits in Admiralty Act is satisfied in this respect.

That the vessels were being operated by or for the United States is obvious. The petition for certiorari states, "Each of the petitioner's vessels were to be operated by it for the United States." (R. 2.)

C. THE MERCHANT MARINE ACT OF 1920 DOES NOT CONFER JURISDICTION UPON THE COURT OF CLAIMS TO ENTERTAIN SUITS FOUNDED UPON MARITIME CAUSES OF ACTION

Petitioner contended in the court below that Section 2 (c) of the Merchant Marine Act of 1920 (*infra*, p. 28) conferred jurisdiction upon the Court of Claims even if that court did not otherwise have jurisdiction.

The Act repealed the emergency shipping fund provisions of the Act of June 15, 1917, and imposed upon the Shipping Board the duty of carrying out all contracts lawfully entered into under the Act repealed. It further provided that the Board should settle and liquidate all matters "arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President," reserving to any person dissatisfied with a decision of the Board "the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

Under the Act of June 15, 1917, an owner whose ship had been requisitioned was entitled to sue for just compensation in the Court of Claims or in the District Courts under the Tucker Act. The execution of a requisition charter did not affect that jurisdiction up to the time of the enactment of the Suits in Admiralty Act, for the United States had by the earlier statutes (p. 23, *infra*), consented to be sued in those courts on contracts, maritime or other-

wise. The Suits in Admiralty Act did not disturb the jurisdiction of the Court of Claims over actions to determine just compensation, but it did, as we believe we have demonstrated, confer exclusive jurisdiction upon the District Courts with respect to suits of a maritime nature on requisition charters. It operated to modify the provisions of the earlier statutes, in respect of maritime causes of action. See *Federal Sugar Refining Co.* v. *United States,* 39 F. (2d) 254, 255, 256 (C. C. A. 2d); 280 U. S. 320.

There is nothing in the Merchant Marine Act inconsistent with the Government's position. That Act, after repealing the Act of June 15, 1917, gave owners the same right to sue which they would have had if the provisions of the Act of 1917 had not been repealed. If we are correct in our contention that the right to sue on a requisition charter was limited by the Suits in Admiralty Act, we submit that the Merchant Marine Act did not purport to remove that limitation. It merely preserved to owners the right to sue for just compensation and did not enlarge their remedies for the enforcement of maritime obligations. But see *Luckenbach Steamship Co.* v. *United States,* 42 F. (2d) 156, *supra.*

The claim in the instant case is based upon the tenth article of the time charter. The suit does not relate to the ascertainment of just compensation but only to the effect of the written agreement. The Act of June 15, 1917, did not commit any ques-

tion arising under such an agreement to the President for decision; but the ninth section of the Suits in Admiralty Act (*infra*, p. 27), vested in the Shipping Board authority to "arbitrate, compromise, or settle" any claims within the provisions of that Act. Section 2 (*c*) of the Merchant Marine Act (p. 28, *infra*) applies to remedies only on claims which the President had the right to decide. As the President never had jurisdiction over claims like that here involved, the Merchant Marine Act is inapplicable. See *Fleet Corporation* v. *Harwood*, 281 U. S. 519, 527.

Petitioner contended in the court below that the Merchant Marine Act is applicable to the instant case because the cause of action is one "arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President" by the repealed Act. But the Act of June 15, 1917, empowered the President to direct the management, operation, and disposal, not only of ships requisitioned, but also of ships constructed or purchased. It would seem to follow that if all matters "arising out of or incident to" the management or operation of requisitioned vessels were under the direction of the President and hence within the jurisdiction of the Court of Claims, then all matters "arising out of or incident to" the management or operation of constructed and purchased vessels are likewise within the same jurisdiction. But this is not true with respect to matters of a maritime nature because such matters are excluded from the juris-

diction of the Court of Claims by the Suits in Admiralty Act. *Federal Sugar Refining Co.* case, *supra.* It is therefore apparent that the Merchant Marine Act does not confer upon the Court of Claims jurisdiction over causes of action which are within the purview of the Suits in Admiralty Act, and if the instant case would otherwise be cognizable only in admiralty the Merchant Marine Act has no application thereto.

Merely to save the point, we wish to say that some doubt arises as to the jurisdiction of the Court of Claims because the suit may have been barred by the six-year statute of limitations. The question was not passed upon by the court below and is not presented upon the pleadings or by the findings and need not be discussed here.

CONCLUSION

We submit that the action of the Court of Claims in dismissing the case should be affirmed on the ground that the Suits in Admiralty Act deprived it of jurisdiction.

Respectfully submitted.

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DECEMBER, 1931.

APPENDIX.

The Act of March 3, 1887, c. 359, 24 Stat. 505 (U. S. C. Title 28, Sec. 250) provides in part as follows (as does also Section 145 of the Judicial Code, 36 Stat. 1087, 1136):

> * * * That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * *

Section 2 of the 1887 Act conferred concurrent jurisdiction upon the district courts and circuit courts, on claims of certain limited amounts.

The Twentieth Clause of Section 24 of the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093 (U. S. C. Title 28, Sec. 41 (20)) confers upon the district courts jurisdiction concurrent with the Court of Claims in respect of claims not exceeding ten thousand dollars.

Section 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260), provides:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in

respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The Urgent Deficiencies Act of June 15, 1917, c. 29, 40 Stat. 182, 183, provided in part as follows:

EMERGENCY SHIPPING FUND

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * *

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the

President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided,* That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the

United States, shall be managed, operated, and disposed of as the President may direct.

The Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528 (U. S. C., Title 46, Secs. 741, 742, 745, 749), provides in part:

> That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the

United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

* * * * *

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

* * * * *

SEC. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act.

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989 (U. S. C. Title 46, Sec. 862) provides in part:

SEC. 2. (a) That the following Acts and parts of Acts are hereby repealed, subject to

the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended * * *.

* * * * *

(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

* * * * *

(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and pay-

ment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.

* * * * *

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REHEARING.

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Of Counsel.

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vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

The petitioner respectfully requests a rehearing of this cause upon the ground that in its decision this Court has extended the admiralty and maritime jurisdiction beyond the limits heretofore well settled by the decisions of this and other courts and heretofore universally recognized, and upon the ground that this Court has ignored the admitted facts in describing the nature and purpose of the agreements involved herein.

This Court erred, we respectfully submit, in stating in its opinion (p. 5) that:

> "It is enough that the right asserted is upon express contract with the shipowner for its operation of the ship for the government and stipulates compensation both for use of the ship and for service rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction."

It is submitted that this statement is a departure from the law, heretofore well established, governing the jurisdiction of admiralty over contracts.

A contract is within the admiralty jurisdiction only if its essential object and subject-matter are wholly maritime. A contract is maritime only if it directly relates solely to commerce and navigation upon navigable waters. A contract providing compensation for the use of a ship may or may not relate solely to commerce and navigation and may or may not therefore be maritime. If a contract involving the use of a ship contains non-maritime covenants it is one over which admiralty has no jurisdiction.

Ward v. *Thompson*, 22 How. 330, was a contract which provided compensation for the use of a ship. Nevertheless, it was held to be non-maritime because it was not a mere charter-party, but involved also a division of net earnings between the owner and charterer.

In determining whether a contract involving compensation for the use of a vessel is maritime the substance rather than merely the form is decisive. *The Ada*, 250 Fed. 194 (C. C. A. 2, 1918).

The Richard Winslow, 71 Fed. 426 (C. C. A. 7, 1896) involved a contract for the use of a vessel, but it was held to be non-maritime because it was not in all respects one which related to navigation and commerce on navigable waters.

See also, *The Pennsylvania,* 154 Fed. 9 (C. C. A. 2, 1907); *The Virginia,* 1 Fed. Cas. No. 141 (Cir. Ct. 1840).

The opinion evidences no intention to repudiate these decisions or to enlarge the scope of jurisdiction in admiralty; yet upon the record the present opinion, if allowed to stand, will have the effect of changing the law of admiralty jurisdiction in a manner never before contemplated.

The Court has failed to consider the non-maritime object and purpose of the provisions of the so-called requisition charters, which fixed compensation for the taking and use of the vessels under requisition.

The Court, referring to the requisition charters, says in its opinion (p. 5):

> "The effect of the agreement was to release the petitioner's rights, growing out of the requisition, and to define the rights of the parties with respect to the use of petitioner's ships and the compensation for them, as effectively and completely and with the same consequences as though no requisition had ever been made."

The record shows the fact to be otherwise. The government has admitted, and the record shows without contradiction (R. 8, 9, 16 and 20), that the petitioner's ships were seized and at all times, before and after the contract, were retained and possessed by the

United States by virtue of the provisions of the Act of June 15, 1917. *The requisition charters specifically provided that the ships should continue to be in the possession of the United States under the requisition.* They provided (R. 17):

> "The steamship shall remain in the service of the United States under the requisition order * * * for such period of time as the United States may determine * * *."

The agreement specifically referred (R. 16) to operation of the vessels "under the requisition". Thus, the United States continued to possess and operate the vessels at all times after the execution of the requisition charters solely in the exercise of its power of eminent domain, and the rights of the United States were based, not upon written agreement, but solely upon its exercise of that power.

It is true that the so-called requisition charters fixed the compensation to be paid to the shipowner for the use of the requisitioned vessels, but these agreements did not confer any rights whatever upon the United States with reference to the vessels. The compensation which was fixed was a substitute for the compensation which would have been paid had the amount been fixed by the President or determined in judicial proceedings. The subject-matter and object of the contract in this respect was the determination of a liquidated sum to be paid to the shipowner, as or in lieu of the just compensation which would have been paid in the absence of any agreement. It is conceded that the compensation which would have been payable but for

the agreements would have been the subject of a suit at law (Opin., p. 4). The subject of the amount of compensation to be paid is none the less non-maritime because it is fixed by agreement rather than by judicial proceedings. The subject of the contract is the non-maritime subject of compensation for the seizure and use under requisition by the Government of private property. It is this essential nature and purpose of the agreements which determines jurisdiction, and not the fact that the compensation for the seizure and use happens to relate to a vessel. The contracts bear no relation to the employment of the vessels as instruments of commerce or to any maritime adventure, but solely arise out of and relate to the compensation which the United States was bound to pay in any event as the result of the seizure. It is immaterial, if it be a fact, that the requisition charters released petitioner's rights growing out of the requisition. The subject of the contracts and their purpose were solely the determination of compensation which arose out of the exercise of the governmental power of eminent domain and which was unconnected with any use to which the vessels might be devoted.

It is respectfully urged that a contract providing compensation for service rendered and expense incurred in the operation or maintenance of a ship, may or may not be maritime. *Minturn* v. *Maynard*, 17 How. 477; *Cory Bros. & Co.* v. *United States*, 51 Fed. (2d) 1010.

However, it is immaterial in the present instance whether such provisions are or are not maritime. The requisition charters were not maritime to the extent

that they fixed compensation for the use of vessels under requisition and the contracts are not, therefore, cognizable in admiralty. Admiralty is without jurisdiction over contracts which are partly maritime and partly non-maritime. *Norton* v. *The Richard Winslow*, 71 Fed. 426; *The Pennsylvania*, 154 Fed. 9; *Pacific Coast Steamship Co.* v. *Ferguson*, 76 Fed. 993; *The Ada*, 250 Fed. 194; *Graham* v. *Oregon R. & N. Co.*, 134 Fed. 454.

The present suit is based upon a claim for compensation for use of vessels under the requisition. If it does include a claim for other services maritime in their nature, nevertheless only a single amount of compensation was fixed; and that compensation, not being susceptible of separation into its component parts, may be recovered only in an action at law.

It is respectfully submitted that the opinion in this case entirely ignores the non-maritime purpose of recovering compensation for the use of a ship while under requisition and is based upon the erroneous assumption that every contract which stipulates compensation for the use of a ship is maritime.

Respectfully submitted,

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